

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re: : Chapter 11
:
: Case No.
W.R. GRACE & CO., et al, : 01-01139 JKF
:
: (Jointly
Debtors : Administered)

Friday, May 15, 2009

Oral deposition of DAVID T.

AUSTERN, ESQUIRE, taken pursuant to
notice, was held at the offices of ORRICK
HERRINGTON & SUTCLIFFE, LLP, Columbia
Center, 1152 15th Street, N.W.,
Washington, DC 20005-1706, commencing at
10:07 a.m., on the above date, before
Lori A. Zabielski, a Registered
Professional Reporter and Notary Public
in and for the Commonwealth of
Pennsylvania.

MAGNA LEGAL SERVICES
Seven Penn Center
1635 Market Street
8th Floor
Philadelphia, Pennsylvania 19103

Page 2

1 APPEARANCES:
 2
 3 DRINKER BIDDLE & REATH, LLP
 4 BY: MICHAEL F. BROWN, ESQUIRE
 5 One Logan Square
 6 18th & Cherry Streets
 7 Philadelphia, Pennsylvania 19103-6996
 8 215.988.2988
 9 (brownmf@dbr.com)
 10 (jeffrey.boerger@dbr.com)
 11 Representing OneBeacon America Insurance
 12 Company, Seaton Insurance Company,
 13 Government Employees Insurance Company,
 14 Columbia Insurance Company f/k/a Republic
 15 Insurance Company
 16
 17 ORRICK HERRINGTON & SUTCLIFFE, LLP
 18 BY: JONATHAN P. GUY, ESQUIRE
 19 ROGER FRANKEL, ESQUIRE
 20 JOSHUA M. CUTLER, ESQUIRE
 21 Columbia Center
 22 1152 15th Street, N.W.
 23 Washington, DC 20005-1706
 24 202.339.8427
 (jguy@orrick.com)
 Representing Future Claimants
 Representative
 CAPLIN & DRYSDALE, CHARTERED
 BY: JEFFREY A. LIESEMER, ESQUIRE
 One Thomas Circle, NW
 Suite 1100
 Washington, DC 20005
 202.862.5000
 (jal@capdale.com)
 Representing Grace, Official Committee of
 Asbestos Personal Injury Claimants
 ("ACC")

Page 4

1 APPEARANCES (continued)
 2
 3 VORYS, SATER, SEYMOUR AND PEASE, LLP
 4 BY: WILLIAM J. FOHLMAN, ESQUIRE*
 5 TIFFANY STRELOW COBB, ESQUIRE*
 6 (*VIA TELECONFERENCE)
 7 52 East Gay Street
 8 Columbus, Ohio 43215
 9 614.464.8322
 10 (wjfohlman@vorys.com)
 11 (tscoobb@vorys.com)
 12 Representing The Scotts Company, LLC
 13
 14 COHN WHITESELL & GOLDBERG, LLP
 15 BY: CHRISTOPHER M. CANDON, ESQUIRE
 16 101 Arch Street
 17 Boston, Massachusetts 02110
 18 617.951.2505
 19 (candon@cwgl1.com)
 20 Representing the Libby Claimants
 21
 22 SPEIGHTS & RUNYAN
 23 BY: DANIEL H. SPEIGHTS, ESQUIRE*
 24 (*VIA TELECONFERENCE)
 200 Jackson Avenue East
 P.O. Box 685
 Hampton, South Carolina 29924
 803.943.4444
 (dspeights@speightsrunyan.com)
 Representing Anderson Memorial Hospital
 TUCKER ARENSBERG, P.C.
 BY: MICHAEL A. SHINER, ESQUIRE*
 (*VIA TELECONFERENCE)
 1500 One PPG Place
 Pittsburgh, Pennsylvania 15222
 412.594.5586
 (mshiner@tuckerlaw.com)
 Representing Certain London Market

Page 3

1 APPEARANCES (continued)
 2
 3 KIRKLAND & ELLIS, LLP
 4 BY: THEODORE L. FREEDMAN, ESQUIRE*
 5 (*VIA TELECONFERENCE)
 6 Citigroup Center
 7 153 East 53rd Street
 8 New York, New York 10022-4611
 9 212.446.4800
 10 (theodore.freedman@kirkland.com)
 11 Representing the Debtors
 12
 13 THE LAW OFFICES OF JANET S. BAER, P.C.
 14 BY: JANET S. BAER, ESQUIRE
 15 70 West Madison Street
 16 Suite 2100
 17 Chicago, Illinois 606002
 18 312.641.2162
 19 Representing the Debtors
 20
 21 SIMPSON THACHER & BARTLETT, LLP
 22 BY: ELISA ALCABES, ESQUIRE
 23 KAREN E. ABRAVANEL, ESQUIRE*
 24 (*VIA TELECONFERENCE)
 425 Lexington Avenue
 New York, New York 10017-3954
 212.455.3133
 (ealcabes@stblaw.com)
 (kabravanel@stblaw.com)
 Representing Travelers Casualty and
 Surety Company

Page 5

1 APPEARANCES (continued)
 2
 3 BILZIN SUMBERG BAENA PRICE & AXELROD, LLP
 4 BY: MATTHEW I. KRAMER, ESQUIRE*
 5 (*VIA TELECONFERENCE)
 6 200 South Biscayne Boulevard
 7 Suite 2500
 8 Miami, Florida 33131-5340
 9 305.450.7246
 10 (mkramer@bilzin.com)
 11 Representing Property Damage Committee
 12
 13 STROOCK & STROOCK & LAVAN, LLP
 14 BY: DANIEL J. HARRIS, ESQUIRE*
 15 (*VIA TELECONFERENCE)
 16 180 Maiden Lane
 17 New York, New York 10038-4982
 18 212.806.5400
 19 (djharris@stroock.com)
 20 Representing Official Committee of
 21 Unsecured Creditors
 22
 23 CROWELL & MORING, LLP
 24 BY: MARK PLEVIN, ESQUIRE
 NOAH S. BLOOMBERG, ESQUIRE
 1001 Pennsylvania Avenue NW
 Washington, DC 20004-2595
 202.624.2913
 (mplevin@crowell.com)
 (nbloomberg@crowell.com)
 Representing Fireman's Fund Insurance
 (Surety Bond)
 STEVENS & LEE, P.C.
 BY: JOHN D. DEMMY, ESQUIRE
 1818 Market Street, 29th Floor
 Philadelphia, Pennsylvania 19103-1702
 215.751.2885
 (jdd@stevenslee.com)

1 APPEARANCES (continued)
2
3 ALAN B. RICH LAW OFFICES
4 BY: ALAN B. RICH, ESQUIRE
5 Elm Place, Suite 4620
6 1401 Elm Street
7 Dallas, Texas 75202
8 214.744.5100
9 (arich@alanrichlaw.com)
10 Representing Property Damage FCR
11
12 CONNOLLY BOVE LODGE & HUTZ, LLP
13 BY: JEFFREY C. WISLER, ESQUIRE
14 The Nemours Building
15 1007 North Orange Street
16 P.O. Box 2207
17 Wilmington, Delaware 19899
18 302.88.6528
19 (jwisler@cblh.com)
20 Representing Maryland Casualty
21
22 ECKERT SEAMANS CHERIN & MELLOTT, LLC
23 BY: EDWARD J. LONGOSZ, II, ESQUIRE
24 1747 Pennsylvania Avenue, NW
12th Floor
Washington, DC 20006
202.639.6619
(elongosz@eckertseamans.com)
Representing Maryland Casualty and Zurich
COZEN O'CONNOR
BY: JACOB C. COHN, ESQUIRE
1909 Market Street
Philadelphia, Pennsylvania 19103-3508
215.665.2147
(jcohn@cozen.com)
Representing Federal Insurance Company

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20
21
22
23
24

1 APPEARANCES (continued)
2
3 CUYLER BURK, P.C.
4 BY: STEFANO V. CALOGERO, ESQUIRE
5 Parsippany Corporate Center
6 Four Century Drive
7 Parsippany, New Jersey 07054
8 973.734.3200
9 (scalogero@cuyler.com)
10 Representing Allstate Insurance Company
11
12 GOODWIN PROCTER, LLP
13 BY: BRIAN H. MUKHERJEE, ESQUIRE*
14 (*VIA TELECONFERENCE)
15 901 New York Avenue, N.W.
16 Washington, DC 20001
17 202.346.4124
18 (bmukherjee@goodwinprocter.com)
19 Representing CNA Insurance
20
21 WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
22 BY: KEVIN J. MANGAN, ESQUIRE*
23 (*VIA TELECONFERENCE)
24 222 Delaware Avenue
Suite 1501
Wilmington, Delaware 19801
302.252.4361
(kmangan@wcsr.com)
Representing State of Montana
PEPPER HAMILTON, LLP
BY: LINDA J. CASEY, ESQUIRE*
(*VIA TELECONFERENCE)
3000 Two Logan Square
Philadelphia, Pennsylvania 19103
215.981.4000
(caseyl@pepperlaw.com)
Representing BNSF Railway Company

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1 Q. Those are estimates, I take
2 it?

3 A. Those are estimates, yes.

4 Q. What did you do in
5 preparation for today's deposition?

6 A. I reviewed some documents,
7 and I spoke to counsel.

8 Q. What documents did you
9 review?

10 A. I also reviewed some
11 transcripts.

12 I reviewed the Personal
13 Injury Trust Agreement; the Trust
14 Distribution Process -- the Personal
15 Injury Trust Distribution Process; the
16 Transfer Agreement; the Cooperation
17 Agreement; I reviewed Ms. Biggs' latest
18 estimation report; Dr. Peterson's latest
19 report; Dr. Florence's latest report;
20 Dr. Whitehouse's -- one of
21 Dr. Whitehouse's reports -- I am sorry --
22 two of Dr. Whitehouse's reports; the
23 rebuttal to those reports from Dr. Welsh
24 and Dr. Freedman; the objections filed by

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1 thing in preparation of the deposition.
2 I listened to parts of, albeit not all,
3 of the Lockwood deposition.

4 Q. Did you meet with counsel in
5 preparation for the deposition?

6 A. Yes.

7 Q. When?

8 A. Last Friday and yesterday.

9 Q. And for how long last
10 Friday? What period of time did you meet
11 with counsel?

12 A. I confess I don't remember,
13 but it was several hours.

14 Q. And the more recent meeting?

15 A. I would say three hours.

16 Q. Was it just counsel for the
17 Future Claimants' Representative or were
18 other Plan proponent counsel present?

19 A. No. There were no other
20 Plan proponent counsel.

21 Q. In reviewing Mr. Lockwood's
22 deposition testimony, was there anything
23 in his transcript with which you
24 disagreed?

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1 the Libby claimants and by one or more
2 insurance companies, and I am not sure I
3 know which ones; my prior deposition in
4 this case; my prior deposition in the
5 Combustion Engineering case; my testimony
6 in the Combustion Engineering case. I
7 may have left something out, but I think
8 those are most of the documents I
9 reviewed.

10 Q. Okay. And you also
11 mentioned that you had reviewed some
12 transcripts?

13 A. Those were the depositions
14 and trial testimony -- oh, excuse me.
15 Yes. I reviewed Mr. Lockwood's
16 deposition.

17 Q. Did you actually review the
18 Amended Plan of Reorganization?

19 A. Yes -- and excuse me -- and
20 the Disclosure Statement.

21 Q. And over what period of time
22 did you review all these materials in
23 preparation for your deposition?

24 A. Two weeks. I did one other

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1 A. I don't remember -- nothing
2 occurs to me, although if you showed me a
3 question and answer, I might say I
4 disagreed. But I don't recall anything.

5 Q. Okay. When you listened in
6 on a portion of the deposition, was there
7 anything that you heard by way of an
8 answer by Mr. Lockwood that struck you as
9 inaccurate?

10 A. Not that I recall.

11 Q. Okay. Now, you mentioned
12 that you had reviewed the Disclosure
13 Statement, the Plan, the PI Trust
14 Agreement I assume you were referring to,
15 the PI Trust Distribution Procedures, the
16 Transfer Agreement, and the Cooperation
17 Agreement?

18 A. Yes.

19 Q. Do you understand all of
20 those documents?

21 A. No.

22 Q. Are there particular
23 documents that you understand better than
24 others?

Page 18

1 A. Yes.

2 Q. Which ones?

3 A. The Trust Distribution
4 Process.

5 Q. By that, you mean the
6 Asbestos PI Trust Distribution
7 Procedures?

8 A. Yes, yes.

9 Q. Okay.

10 A. I will refer to it as the
11 TDP, most likely.

12 Q. We will finish the
13 deposition a lot sooner if you do that.

14 A. And there were some sections
15 in some of the other documents I thought
16 I understood and some sections I thought
17 I did not.

18 Q. Okay. How about the Trust
19 Agreement?

20 A. I believe I understood most
21 of that.

22 Q. Okay. You were appointed by
23 the bankruptcy court as the, quote, legal
24 representative, close quote, under

Page 20

1 FCR? I understand that you were approved
2 by the bankruptcy court, but how were you
3 presented, if you will, for that role?

4 A. Understanding I was not in
5 the case at the time, I can only tell you
6 what documents I have looked at appear to
7 say.

8 Q. Okay.

9 A. The Debtor presented to the
10 court a motion of seeking an appointment
11 of an FCR, provided the court with three
12 names and an untitled fourth name -- I
13 will explain that in a moment. The three
14 names proposed were me and two other
15 people, and then a statement that the
16 Property Damage Representatives didn't
17 want any of the three names mentioned by
18 the Debtor and wanted some unnamed fourth
19 person. So there were four, if you will,
20 potential choices presented to the
21 bankruptcy court.

22 Q. Who were the other two named
23 individuals?

24 A. Professor Eric Green and

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1 Section 524(g) of the bankruptcy code,
2 correct?

3 A. Correct.

4 Q. When did that occur?

5 A. Just about this time of year
6 five years ago.

7 Q. Okay. So in 2004?

8 A. Yes.

9 Q. And, as I understand it,
10 under the Plan your title is the asbestos
11 PI FCR, correct?

12 A. Yes.

13 Q. And the FCR is for Future
14 Claimants' Representative?

15 A. Yes.

16 Q. You will understand if I
17 refer to you as the FCR in the
18 deposition?

19 A. I will understand what the
20 reference is.

21 Q. Okay. You are a
22 co-proponent of the Plan, correct?

23 A. Yes.

24 Q. How did you come to be the

Page 21

1 Dean Trafelet.

2 Q. I gather from your answer
3 that at the time this occurred, it was
4 contemplated that there would be a single
5 asbestos trust that would handle both
6 personal injury claims and property
7 damage claims?

8 A. I don't know.

9 Q. Do you have any idea how the
10 Debtors came up with the three names that
11 they did?

12 A. I know what they said in
13 their pleading. They said they had
14 discussed this matter with, well,
15 obviously, the Property Damage Trust
16 Representatives that I mentioned, and
17 they had discussed it with one or more
18 Creditors Committees and the Asbestos
19 Claimants Committee.

20 Q. And then did the bankruptcy
21 court select you from the list of
22 contenders for the position?

23 A. Well, I have left out a
24 pleading.

Page 22

1 Q. Okay.

2 A. The Asbestos Claimants
3 Committee filed a motion, I guess, in
4 response to the Debtors motion in which
5 they -- I should back up a step.

6 The Debtors motion had a
7 chart on it, as I recall, which showed
8 who opposed various of the names
9 mentioned and who was in favor of various
10 of the names mentioned, looking at the
11 committees. And one of the things that
12 was said was that the ACC opposed me and
13 wanted Dean Trafelet. The ACC responded
14 to that, I believe, saying they did not
15 oppose me, but they wanted Dean Trafelet
16 rather than me.

17 Q. Okay. And did judge
18 Fitzgerald then make a decision based
19 upon the pleadings you just described?

20 A. I don't know what drove her
21 decision, but she made a decision and she
22 selected me.

23 Q. Okay. Now, did you have the
4 title FCR with respect to other asbestos

Page 24

1 A. So I certainly don't have
2 that role. I advise the trustees -- I am
3 the legal advisor to the trustees and
4 sometimes trust staff.

5 Q. And what is your role as the
6 FCR for the Combustion Engineering Trust?

7 A. I represent future
8 claimants.

9 Q. Are you familiar with a term
10 "Trust Advisory Committee"?

11 A. Yes.

12 Q. Is there a Trust Advisory
13 Committee for the Combustion Engineering
14 Trust?

15 A. Yes.

16 Q. And who are its current
17 members?

18 A. Mr. Cooney, Mr. Weitz,
19 Mr. Kazan, and there is somebody else.
20 And I am not sure who it is.

21 Q. With respect to the
22 Combustion Engineering Trust, did you
23 have the role of future claimants -- let
24 me back up. Strike that.

Page 23

1 trusts?

2 A. Yes.

3 Q. Which ones? Actually, just
4 for purposes of that question, I want to
5 focus on trusts that are obviously up and
6 running as opposed to ones that may be in
7 the works.

8 A. One other trust, the
9 Combustion Engineering Trust.

10 Q. And then you mentioned
11 earlier that you are the general counsel
12 for the Manville Trust?

13 A. Yes.

14 Q. Is your role as the general
15 counsel for the Manville Trust akin to
16 your role as the FCR for the Combustion
17 Engineering Trust?

18 A. No.

19 Q. Okay. Can you describe the
20 differences in your roles?

1 A. Well, first of all, the
22 Manville Trust has a Futures Claims
23 Representative.

24 Q. Okay.

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1 Did you have the role of
2 legal representative, as that term is
3 used in Section 524(g) of the bankruptcy
4 code?

5 A. I believe that was what I
6 was, yes.

7 Q. Okay. And were you a
8 co-proponent of the CE Trust --

9 A. Yes.

10 Q. The CE Plan?

11 A. Yes.

12 Q. Putting aside confirmed
13 plans and trusts that are up and running,
14 are you the designated Future Claimants'
15 Representative in connection with any
16 pending asbestos bankruptcy cases other
17 than the Grace case?

18 A. No.

19 Q. Are you familiar with the
20 statutory requirements for a Section
21 524(g) trust?

22 A. I am generally familiar. I
23 am not sure I can recall each and every
24 one right at the moment.

1 Q. Do you have any
2 understanding at all of what a demand is?

3 A. In bankruptcy law, no.

4 Q. Who do you understand to be
5 your constituency?

6 A. Future claimants.

7 Q. Do you have an understanding
8 that future claimants are the holders of
9 future demands?

10 A. I don't know.

11 Q. Do you have an understanding
12 as to whether the Debtors face the
13 prospect of any future asbestos PD
14 demands or asbestos PD claims?

15 A. I believe there are
16 scenarios in which they do.

17 Q. Could you describe them?

18 A. No, but I believe that there
19 are property damage claims that -- that
20 the Debtor is responsible
21 post-confirmation for certain property
22 damage claims.

23 Q. And that those property
24 damage claims would fit within what you

1 today, for which you -- strike that.

2 Are there particular
3 provisions in the Plan that you don't
4 understand?

5 A. Yes.

6 Q. Are there any that stick out
7 in your mind in that regard?

8 A. Can I look at the Plan for a
9 moment?

10 Q. Sure.

11 A. By way of example, 7.15 of
12 the document.

13 Q. That's one that you do not
14 understand?

15 A. Well, it's one I have
16 trouble trying to understand.

17 Q. You are in good company.

18 A. There are other sections of
19 the Plan and other documents I reviewed
20 that address insurance issues, which I
21 have trouble understanding and rely on
22 counsel to explain to me.

23 Q. Well, as would have it, 7.15
24 is an area that I wanted to question you

1 understand to be a future property damage
2 claim as opposed to a current property
3 damage claim?

4 A. I am not sure.

5 Q. All right.

6 MR. BROWN: We will mark
7 this Austern-3.

8 (Austern-3 marked for
9 identification at this time.)

10 BY MR. BROWN:

11 Q. Mr. Austern, you have before
12 you a document that we have marked
13 Austern-3.

14 My first question is, can
15 you identify it?

16 A. It's the first Amended Joint
17 Plan of Reorganization.

18 Q. And this is one of the
19 documents you indicated previously that
20 you reviewed in preparation for this
21 deposition, correct?

22 A. Yes.

23 Q. Are there particular
24 provisions in the Plan, as you sit here

1 about. So why don't we turn to that
2 section.

3 A. (Witness complies with
4 request.)

5 Q. And why don't you take a
6 moment to review it. It's not terribly
7 long.

8 MR. GUY: Is there any
9 particular section, Michael?

10 MR. BROWN: Well, I have
11 questions about a few sections, so
12 it might be easiest if he reads
13 the whole thing.

14 THE WITNESS: Okay. I have
15 reviewed it.

16 BY MR. BROWN:

17 Q. Okay. Recognizing that you
18 don't understand it fully, do you have an
19 idea of what its intended purpose is?

20 A. Its intended purpose, as I
21 understand it, is to create insurance
22 neutrality.

23 Q. And what do you understand
24 insurance neutrality to be?

1 A. That the Plan does not
2 interfere with the rights of the
3 insurance companies.

4 **Q. Okay. Are there any**
5 **exceptions to that broad statement, as**
6 **you understand Section 7.15?**

7 MR. COHN: You might want to
8 rephrase that because you just
9 changed from his understanding of
10 insurance neutrality in the broad
11 concept to a provision that very
12 clearly is not what it was
13 announced to be.

14 MR. BROWN: Can you read the
15 last question?

16 (The reporter read from the
17 record as requested.)

18 BY MR. BROWN:

19 **Q. You understand Section 7.15**
20 **to be intended to preserve the insurers'**
21 **rights; is that a fair statement?**

22 A. Yes.

23 **Q. Okay. Is it your belief**
1 **that that's what it accomplishes?**

1 MR. GUY: Objection.

2 MR. LIESEMER: Object to the
3 form of the question.

4 MR. GUY: It calls for a
5 legal conclusion. The witness is
6 a fact witness.

7 MS. BAER: Same objection.

8 THE WITNESS: I am not
9 positive I know what you mean by
10 preemptory. You sort of focused
11 on my problem with 7.15. I don't
12 know how you read the successive
13 paragraphs as impacting on each
14 other.

15 BY MR. BROWN:

16 **Q. Do you believe Section 7.15**
17 **to be unclear?**

18 A. To me.

19 MR. GUY: Objection.

20 BY MR. BROWN:

21 **Q. Okay. Well, let's explore**
22 **that a little bit.**

23 **Let's look at Section**
24 **7.15(b), and you will see that there is a**

1 A. I don't know.

2 (There was a discussion held
3 off the record at this time.)

4 BY MR. BROWN:

5 **Q. Mr. Austern, are you**
6 **familiar with the UNR decision in the**
7 **Seventh Circuit, the citation to which is**
8 **942 F.2d 1101?**

9 A. I am familiar with the UNR
10 Trust. I am not familiar with the
11 decision.

12 **Q. Are you familiar with what**
13 **happened in the trial court in the**
14 **Fuller-Austin coverage case?**

15 MR. GUY: Objection, vague.

16 THE WITNESS: No.

17 BY MR. BROWN:

18 **Q. You said you just read**
19 **Section 7.15. Let's focus on (a).**

20 **Is your understanding that**
21 **(a) is a preemptory provision with**
22 **respect to the Plan, Plan documents, and**
23 **Confirmation Order except as specifically**
24 **set forth in Section 7.15?**

1 **reference in subsection (b) to, quote,**
2 **the beneficiaries of the Asbestos PI**
3 **Trust?**

4 **Do you see that?**

5 A. Yes.

6 **Q. Do you have any**
7 **understanding as to what that means?**

8 A. It means what it states, the
9 beneficiaries of the Personal Injury
10 Trust.

11 **Q. And who are they?**

12 A. Well, there are personal
13 injury claimants obviously, and there
14 are, under certain circumstances,
15 indirect personal injury claimants.

16 **Q. Okay. And who do you**
17 **understand to be within the definition of**
18 **indirect PI Trust claimants?**

19 A. Entities that can bring
20 claims as indirect claimants on the
21 grounds that they have paid dollars that
22 the Personal Injury Trust should
23 reimburse them for.

24 **Q. Okay. Are you familiar at**

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1 all with any of the Debtors' pre-petition
2 settlements with insurance companies?

3 A. I have seen a list, and
4 that's the extent of my knowledge.

5 Q. Are you aware that at least
6 certain of those insurers have
7 contractual indemnity provisions against
8 the Debtors in those settlement
9 agreements?

10 A. Can you explain to me what
11 you mean by contractual?

12 Q. Sure. I will represent to
13 you that there are settlement agreements
14 that are pre-petition settlement
15 agreements in which the insurer paid a
16 sum of money to the Debtors, and in
17 exchange for paying that money, the
18 Debtors agreed to indemnify the insurer
19 in the event that claims were asserted
20 against the policy after the settlement
21 by other parties.

22 A. Third party claimants?

23 Q. Third parties.

1 Do you understand the term

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1 "indirect PI Trust claims" to include the
2 insurers insofar as they have the type of
3 contractual indemnity claim that I just
4 described?

5 MR. LIESEMER: Object to the
6 form of the question.

7 MR. GUY: Same objection.

8 THE WITNESS: Mr. Brown, I
9 understand that all asbestos
10 personal injury insurance has been
11 channelled to the Asbestos
12 Personal Injury Trust. And there
13 are settled insurance companies
14 that -- how would I describe it --
15 their obligations have been
16 settled with the Debtor; there are
17 unsettled ones; and then there are
18 those that have coverage in place
19 agreements or reimbursement
20 agreements.

1 I don't know where your
22 question fits into my
23 understanding of those buckets of
24 insurance entities.

Page 52

1 BY MR. BROWN:

2 Q. Okay. Let me parse that
3 out. Do you understand certain of the
4 Debtors' insurance companies to have
5 indirect asbestos PI claims?

6 A. They could. They could have
7 the right to file them, yes.

8 Q. Okay. And do you understand
9 those insurers to fit within the phrase
10 in (b), the beneficiaries of the Asbestos
11 PI Trust? In other words, are the
12 insurers that have the contractual
13 indemnity claims against the Debtors,
14 quote, beneficiaries of the Asbestos PI
15 Trust, as that term is used in 7.15(b)?

16 MR. LIESEMER: Object to the
17 form of the question.

18 MR. GUY: Objection, asked
19 and answered, compound.

20 MS. BAER: Same objection.

21 MR. GUY: You may answer.

22 THE WITNESS: As far as I
23 know, they could be under certain
24 circumstances.

Page 53

1 BY MR. BROWN:

2 Q. All right. Then I would now
3 like you to compare the language in (a)
4 and the language in (b) based on the
5 assumption that they are.

6 MR. GUY: Now I am confused.

7 MR. BROWN: Anyone who reads
8 this provision is confused.

9 MR. GUY: I am confused.
10 It's talking --

11 THE WITNESS: You are asking
12 me to compare (a) to (b) or (b) to
13 (a)?

14 MR. GUY: For what purpose?

15 BY MR. BROWN:

16 Q. If the insurer that I just
17 described is a beneficiary of the
18 Asbestos PI Trust, then, according to
19 (b), it is bound by the Plan, the Plan
20 documents, and the Confirmation Order,
21 correct?

22 A. That's what (b) says, yes.

23 Q. So does (b) then supersede
24 subsection (a)?

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1 A. I don't know.

2 Q. Let's go to a defined term
3 in the Plan which appears on page 6,
4 number 16, quote, asbestos insurer
5 coverage defenses. Take a moment to
6 review that provision.

7 MR. GUY: So that I don't
8 have to repeat it throughout, I am
9 going to enter a standing
10 objection. The witness is here
11 not as a 30(b)(6) witness on
12 insurer issues, and the Plan says
13 what it says.

14 MR. BROWN: I understand.

15 MR. COHN: Can you keep your
16 voice up, Tom?

17 MR. GUY: We will go off the
18 record.

19 (There was a discussion held
20 off the record at this time.)

21 BY MR. BROWN:

22 Q. Have you had a chance to
23 review the definition of asbestos insurer
24 coverage defenses?

Page 56

1 Q. Okay. My question is, do
2 you have an understanding as to whether
3 the language in 7.15(a) supersedes the
4 language in 11.9?

5 A. I don't know.

6 Q. Do you know whether it's
7 intended to?

8 A. No.

9 Q. Reading both of those
10 provisions, do you understand whether it
11 does?

12 MR. GUY: Objection, calls
13 for a legal conclusion.

14 MR. BROWN: It just calls
15 for his understanding.

16 THE WITNESS: Mr. Brown, I
17 must confess to you when I read
18 11.9 both the first time and the
19 second time, what I concentrated
20 on was on the fact that I had
21 exculpation, and I didn't
22 concentrate very much more.

23 BY MR. BROWN:

24 Q. So you have been exculpated

Page 55

1 A. Yes.

2 Q. Do you understand it?

3 A. No.

4 Q. Fair enough. You are not
5 alone.

6 Let's get back to 7.15.

7 A. Can you give me the page
8 again?

9 Q. I am sorry. It's page 87.
10 Actually, what I would like to do is I
11 want to do a comparison. Can you also
12 look at Section 11.9? You might want to
13 take a moment to read 11.9.

14 A. Can you give me a page
15 number?

16 Q. Yes. Page 115, Section 11.9
17 entitled Exculpation.

18 A. Okay.

19 Q. If you keep that page handy
20 and go back and look at Section 7.15, I
21 will represent to you, feel free to look
22 yourself, that there is no specific
23 reference in 7.15 to Section 11.9.

24 A. I believe that's correct.

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1 if the Plan is confirmed?

2 A. Yes.

3 Q. Let's just use that as an
4 example, not to pick on you, but since
5 you understand at least that much in
6 11.9.

7 Insofar as an insurer had a
8 claim against you, would you still be
9 exculpated in light of Section 7.15 as
10 you understand it?

11 MR. LIESEMER: Object to the
12 form of the question.

13 MR. GUY: Objection, calls
14 for a legal conclusion.

15 THE WITNESS: The first part
16 of the answer is that in the Trust
17 Agreement, I also have what is not
18 labeled as exculpation but
19 indemnification rights, not
20 including gross negligence.

21 The answer is I don't know
22 the answer to that question.

23 BY MR. BROWN:

24 Q. Does that concern you?

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1 A. Does a possible conflict of
2 7.15 to 11.9 concern me?

3 Q. Well, yes.

4 A. No.

5 Q. Okay. Would you go back to
6 Section 7.7 of the Plan?

7 A. Did you say 7.7?

8 Q. Yes. 7.7 entitled
9 Conditions to Occurrence of the
10 Confirmation Date.

11 MR. GUY: What page is that?

12 MR. BROWN: I am sorry. It
13 starts on page 69, and there are a
14 lot of conditions. So it runs to
15 page 81.

16 THE WITNESS: Okay.

17 BY MR. BROWN:

18 Q. You are free to look at
19 that, if you want, but I understand you
20 have already reviewed the Plan.

21 A. Yes.

22 Q. My question is, do you have
23 an understanding as to whether Section
4 7.15 entitled Insurance Neutrality

Page 59

1 preempts Section 7.7 insofar as the
2 Debtors' insurers are concerned?

3 MR. GUY: Objection, calls
4 for a legal conclusion.

5 THE WITNESS: I don't know.

6 BY MR. BROWN:

7 Q. Okay. If you look at
8 Section 7.8, which begins on page 81,
9 that one is entitled Conditions to
10 Occurrence of the Effective Date.

11 If I asked you the same
12 question, would your answer be the same
13 with respect to Section 7.8?

14 A. Can I look at 7.8 for a
15 moment?

16 Q. Sure.

17 A. I am sorry. Could you
18 repeat the question?

19 Q. Let me see if I can rephrase
20 it. My question is whether the
21 preemptory language that appears in
22 Section 7.15(a) preempts the conditions
23 set forth in Section 7.8, as understand
24 it?

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1 MR. GUY: Objection.

2 MR. LIESEMER: I join in
3 that objection.

4 MR. GUY: It calls for a
5 legal conclusion.

6 THE WITNESS: I don't know.

7 BY MR. BROWN:

8 Q. Okay. Can you now look at
9 7.15(h)?

10 A. Did you say (e)?

11 Q. (H). It appears on page 88.

12 A. Yes.

13 Q. Do you understand 7.15(h) to
14 bind all of the Debtors' insurers to all
15 of the releases and injunctions set forth
16 in the Plan?

17 MR. GUY: Objection, calls
18 for a legal conclusion.

19 THE WITNESS: I don't know.

20 BY MR. BROWN:

21 Q. Let's go to page 97 of the
22 Plan, Section 8.5 entitled Successor
23 Claims Injunction.

24 MR. GUY: When you get to a

Page 61

1 point for a break, can we take
2 one?

3 MR. BROWN: Why don't we do
4 that right now.

5 (There was a break from
6 11:03 a.m. to 11:13 a.m.)

7 (The reporter read from the
8 record as requested.)

9 BY MR. BROWN:

10 Q. Mr. Austern, I don't know if
11 you have had a chance to review that
12 section during the break, but if not, can
13 you take a look at it?

14 A. Yes, I have reviewed this.

15 Q. Do you have an understanding
16 as to the purpose of the successor claims
17 injunction?

18 MR. LIESEMER: Object to the
19 form of the question.

20 THE WITNESS: Well, as its
21 name implies, it is intended to
22 enjoin certain conduct. Beyond
23 that, I, of course, was not part
24 of this case when either the

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1 Sealed Air or the Fresenius
2 actions were commenced and
3 concluded and settled.

4 BY MR. BROWN:

5 **Q. Do you understand the**
6 **Fresenius indemnified parties and the**
7 **Sealed Air indemnified parties to be the**
8 **beneficiaries of the successor claims**
9 **injunction?**

10 A. I believe they are.

11 **Q. Okay. The successor claims**
12 **injunction is a 105 injunction, correct?**

13 A. Correct. It's not a 524(g)
14 injunction.

15 **Q. I gather from your answer**
16 **that you understand the difference**
17 **between a Section 105 injunction and a**
18 **Section 524(g) injunction?**

19 A. To the extent that Manville
20 had only a Section 105 injunction, yes.

21 **Q. Okay. Do you have an**
22 **understanding as to whether the successor**
23 **claims injunction enjoins any claims that**
4 **are asbestos-related claims?**

Page 64

1 **Q. The successor claims**
2 **injunction by its terms cannot be lifted?**

3 A. It cannot, as I understand
4 it.

5 **Q. If a claim fits within the**
6 **definition of the successor claim, as**
7 **that term is defined in the Plan, do you**
8 **understand the successor claims**
9 **injunction to enjoin that claim?**

10 MR. LIESEMER: Object to the
11 form of the question.

12 MR. GUY: Same objection.

13 MS. BAER: Same objection.

14 THE WITNESS: I don't know.

15 BY MR. BROWN:

16 **Q. Let's turn back for a moment**
17 **to asbestos PI channelling injunction,**
18 **page 90, Section 8.2.**

19 A. Okay.

20 **Q. Do you understand the**
21 **asbestos PI channelling injunction to be**
22 **purely a 524(g) injunction?**

23 MR. GUY: Objection.

24 THE WITNESS: I don't know.

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1 MR. GUY: Objection, calls
2 for a legal conclusion.

3 THE WITNESS: Do you mean
4 asbestos personal injury, or no?

5 BY MR. BROWN:

6 **Q. Could be, or any other type**
7 **of asbestos-related claim.**

8 A. I am not sure.

9 **Q. Do you understand there to**
10 **be a problem with using a Section 105**
11 **injunction to enjoin asbestos-related**
12 **claims?**

13 MR. GUY: Objection, vague
14 as to problem.

15 MR. LIESEMER: I join in the
16 objection.

17 THE WITNESS: There are
18 certain 105 injunctions that can
19 be lifted. I assume you cannot do
20 that with a 524(g) injunction as
21 it is inexorably intertwined with
22 the Plan itself. I don't know of
23 any other distinctions.

24 BY MR. BROWN:

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1 I don't know if it is or not.

2 BY MR. BROWN:

3 **Q. All right. Mr. Austern, I**
4 **want to shift gears here and turn back to**
5 **the Asbestos PI Trust Agreement, which we**
6 **marked as Austern-2. And I would like to**
7 **direct your attention to Section 6.1.**
8 **And you are going to want a page.**

9 A. It's 34.

10 **Q. In 6.1, the second sentence**
11 **says, "He shall serve in a fiduciary**
12 **capacity, representing the interests of**
13 **the holders of future PI Trust Claims for**
14 **the purpose of protecting the rights of**
15 **such persons."**

16 **Do you see that?**

17 A. Yes.

18 **Q. And the "he" there is you,**
19 **correct?**

20 A. Yes.

21 **Q. What do you understand your**
22 **obligations to be to the holders of**
23 **future PI Trust claims?**

24 A. I represent them, and, as to

1 Q. You will agree with me that
2 Section 2.2(f) sets forth a number of
3 different items for which the trustees
4 need the consent of the TAC and the
5 Future Claimants' Representative,
6 correct?

7 A. Yes.

8 Q. It goes on from Romanette 1
9 to Romanette 15, correct?

10 A. Yes.

11 Q. Why is there a need to have
12 the consent of the Future Claimants'
13 Representative and the TAC on these
14 particular items rather than simply
15 consultation?

16 A. My answer is the same, and I
17 will speak forgetting the TAC, as the
18 Future Claimants' Representative, I want
19 the right to under certain circumstances
20 not agree to a decision by the trustees
21 and have that be the end of the decision.

22 Q. Well, it's not actually the
23 end of the decision, is it?

1 A. No. There are ways of

1 list of them.

2 A. Dean Trafelet, Lewis
3 Sifford, and Harry Huge.

4 Q. And do you know each of
5 those gentlemen?

6 A. Well, in the case of
7 Mr. Huge and Mr. Trafelet, I do know
8 them. In the case of Mr. Sifford, I have
9 met him on a number of occasions.

10 Q. Okay. What is the
11 professional background of Mr. Huge?

12 A. Let's see. I first met him
13 about 40 years ago at the Justice
14 Department. I am sorry. He is a lawyer.
15 He has been with the government. He has
16 been in private practice. Do you want
17 more?

18 Q. Does he have experience with
19 asbestos trusts?

20 A. Yes, he does.

21 Q. What is that experience?

22 A. He is a trustee of Armstrong
23 and I believe a trustee of OCF.

24 Q. How long has he had the role

1 resolving that difference.

2 Q. And what are those?

3 A. Well, I may confuse this
4 with the Manville Trust, but you can
5 seek, shall we say, guidance from the
6 bankruptcy court.

7 Q. By that, you mean a ruling?

8 A. Yes, yes.

9 Q. If your consent has been
10 unreasonably withheld in the views of the
11 trustees?

12 A. That's correct.

13 Q. Is there anything in Section
14 524(g) to your knowledge that requires a
15 Trust, an asbestos Trust, to have a
16 consultation and consent provisions that
17 are set forth in this Trust Agreement?

18 A. I do not know of anything in
19 524(g) like that.

20 Q. Do you know who the
21 designated trustees are for the Asbestos
22 PI Trust?

23 A. Yes.

24 Q. Okay. Who are they? Or

1 of trustee in Armstrong?

2 A. I met with him shortly after
3 he was appointed, and I should be able to
4 remember that. I think four or five
5 years.

6 Q. And how about as a trustee
7 in OCF?

8 A. I don't know.

9 Q. Okay. Why don't you tell me
10 what the professional background of
11 Mr. Sifford is?

12 A. I know him less well.
13 Mr. Sifford is a practicing lawyer in a
14 law firm, and he is an Armstrong trustee,
15 I believe. And that's, I believe, the
16 first time I met him, and thus I looked
17 him up. And according to
18 Martindale-Hubbell, he does both personal
19 injury plaintiff's work and personal
20 injury defense work. I am getting close
21 to exhausting my knowledge of him.

22 Q. Okay. Is the personal
23 injury work that he does, both defense
24 and plaintiff's work, asbestos-related?

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1 A. It is not as far as I know.

2 Q. Do you know what it does
3 relate to?

4 A. No.

5 Q. Okay. Do you know how long
6 he has been a trustee of the Armstrong
7 Trust?

8 A. The same period of time
9 Mr. Huge has been, but I don't remember
10 when that started.

11 Q. I thought you said that one
12 was four to five years ago?

13 A. Four to five years ago. I
14 don't remember exactly.

15 Q. All right. And what is the
16 professional background of Mr. Trafelet?

17 A. Before I get to that, let me
18 explain. Armstrong was confirmed, and
19 for a long time, there was no activity
20 for reasons that allude me. So I can't
21 remember exactly when I got involved in
22 talking to those people.

23 Q. Okay.

24 A. Mr. Trafelet is a lawyer who

1 Q. And would I be correct that
2 he's been that for four or five years?

3 A. Yes.

4 Q. Let's go to Section 4.9 of
5 the Trust Agreement. Take a moment to
6 read that, if you would.

7 A. Okay.

8 Q. The second-to-the-last
9 sentence in Section 4.9 says, "No Trustee
10 shall act as an attorney for any person
11 who holds an asbestos claim."

12 Do you see that?

13 A. Yes.

14 Q. What's the reason for that?

15 A. To avoid conflicts.

16 Q. What type of conflicts?

17 A. Well, you are a trustee of a
18 Plan paying somebody; you shouldn't be
19 paying your client.

20 Q. Is there any other reason?

21 A. Not that I know of.

22 MR. BROWN: Mark this as
23 Austern-4.

24 (Austern-4 marked for

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1 was a judge of, I believe, the Circuit
2 Court in Cook County, Illinois for a
3 period of time, and he is an asbestos
4 trustee of -- it seems to me, he is the
5 sole trustee of the Loomis Trust and also
6 a Futures Rep, I believe, at Armstrong.

7 Q. Okay. And he was one of the
8 gentlemen that you mentioned that, if I
9 remember correctly, the Asbestos PI
10 Committee, otherwise known as the ACC,
11 wanted to have the role that you have?

12 A. Yes.

13 Q. Do you know how long he has
14 been a trustee of the Loomis Trust?

15 A. Since it was confirmed. And
16 this I really should know, but I think it
17 was confirmed about three years ago.

18 Q. Okay. And do you know
19 whether he was the FCR in Armstrong
20 before a plan was confirmed?

21 A. I do not know.

22 Q. Okay. But he is the FCR for
23 the Trust?

24 A. Yes, I believe he is.

1 identification at this time.)

2 BY MR. BROWN:

3 Q. Exhibit-4, Mr. Austern, is
4 Exhibit 6 to the Exhibit Book. My first
5 question for you is, can you identify it?

6 A. It's the Asbestos Insurance
7 Transfer Agreement, which is part of the
8 Plan, as you point out.

9 Q. And I believe you said this
10 is one of the documents that you had
11 reviewed; am I correct?

12 A. Yes.

13 Q. Do you understand this
14 agreement?

15 A. Not in its entirety.

16 Q. Okay. Are there particular
17 provisions of this agreement that you do
18 not understand that you could direct my
19 attention to?

20 A. Well, I would have to look
21 at it for a moment. I am not sure I
22 understand all of the representations and
23 warranties and some of the terms in them.
24 There are two schedules, if I remember

Page 82

1 correctly, here.

2 **Q. I think there is three.**

3 A. All right. I was never
4 quite sure I understood the constant or
5 individual differences between the
6 Schedules 2 and 3.

7 **Q. Okay. Other than what you**
8 **what you just described, do you generally**
9 **have a good handle on the Asbestos**
10 **Insurance Transfer Agreement?**

11 A. I wouldn't describe it as a
12 good handle, but I recognize some of the
13 paragraphs.

14 **Q. All right. Let me direct**
15 **your attention -- let's look at Section 1**
16 **on page 2, and you should probably look**
17 **at subsection (a). And then (d) is the**
18 **one I have the question on.**

19 A. Yes.

20 **Q. In (d), it says, "The**
21 **Transfer is not an assignment of any**
22 **insurance policy."**

23 **Do you see that?**

1 A. Yes.

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1 A. In general.

2 **Q. Could you describe for me**
3 **what some of those duties are?**

4 A. Well, you have to report
5 claims.

6 **Q. Okay.**

7 A. And you have to, under
8 certain policies, confer with the
9 insurance company about what you are
10 settling and why and for how much. And,
11 forgetting individual policies for a
12 minute, under corporate policies, there
13 are certain audit rights that sometimes
14 exist as a condition of payment to the
15 insured.

16 **Q. Are you familiar with the**
17 **requirement in some policies that the**
18 **insurer have a right to defend the**
19 **insured?**

20 MR. LIESEMER: Object to
21 form.

22 THE WITNESS: As well as an
23 obligation.

24 BY MR. BROWN:

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1 **Q. What is it?**

2 A. It's an assignment of a --
3 do you mean what is the Transfer
4 Agreement?

5 **Q. Yes. What is the transfer,**
6 **which is a defined term?**

7 A. Being transferred?

8 **Q. Yes.**

9 A. The proceeds.

10 **Q. Anything else?**

11 A. Well, I confess as the
12 Futures Claims Rep, I never got past the
13 proceeds because the money was what
14 interested me.

15 **Q. Okay. Have you reviewed any**
16 **of the Debtors' insurance policies?**

17 A. No.

18 **Q. Have you ever reviewed a**
19 **general liability insurance policy?**

20 A. Yes.

1 **Q. Do you have a general**
22 **understanding as to the duties and**
23 **obligations of an insured under general**
24 **liability insurance policy?**

Page 85

1 **Q. Okay. And are you aware**
2 **that in some policies there is a right on**
3 **the part of the insurer to associate in**
4 **the defense of the insured?**

5 MR. LIESEMER: Object to
6 form.

7 THE WITNESS: I am not sure
8 I am familiar with that.

9 BY MR. BROWN:

10 **Q. Okay. Well, you indicated**
11 **that the one thing you knew that was**
12 **being transferred was proceeds.**

13 **Are you aware of anything**
14 **else that's being transferred pursuant to**
15 **the Asbestos Insurance Transfer**
16 **Agreement?**

17 A. I am not sure what you mean
18 by anything else, other than the money.

19 **Q. That's it?**

20 A. Well, other things may be
21 being transferred, but I can't think of
22 anything right now.

23 **Q. Okay. Do you have an**
24 **understanding as to whether the Asbestos**

Page 86

1 **PI Trust will become the insured under**
 2 **the policies that are listed on Schedule**
 3 **1 to this agreement?**

4 MR. GUY: Objection, calls
 5 for a legal conclusion.

6 THE WITNESS: Mr. Brown, I
 7 don't know. I certainly hope so.
 8 BY MR. BROWN:

9 **Q. Do you have an understanding**
 10 **as to what, if anything, happens to the**
 11 **obligations of the insured under the**
 12 **policies on Schedule 1 if the Plan is**
 13 **confirmed?**

14 MR. GUY: Objection to form.

15 MR. LIESEMER: I join in
 16 that objection.

17 THE WITNESS: Let me make
 18 sure I understand the question.
 19 What happens to the obligations of
 20 -- if the policy was still in the
 21 hands of the Debtor, what would
 22 happen to the obligations of the
 23 Debtor and the rights of the
 1 insurance company?

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1 BY MR. BROWN:

2 **Q. I am not sure I understood**
 3 **the qualification. Let me try it a**
 4 **little differently.**

5 **To the extent that the**
 6 **Debtor has duties and obligations under**
 7 **one or more of its insurance policies, if**
 8 **this Plan is confirmed, what happens to**
 9 **those duties and obligations, as you**
 10 **understand it?**

11 MR. LIESEMER: Object to the
 12 form.

13 MS. BAER: I join in the
 14 objection.

15 THE WITNESS: The Plan is
 16 going to be administered pursuant
 17 to the Trust Distribution Process
 18 as it affects personal injury
 19 asbestos claims.

20 To that extent, the personal
 21 injury Trust, as far as I know, is
 22 not going to call up each and
 23 every insurance company and say
 24 "Can I settle this claim?" I hope

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1 that's responsive to your
 2 question.

3 BY MR. BROWN:

4 **Q. What is it going to do?**
 5 **What is the Trust going to do?**

6 MS. BAER: Objection to
 7 form.

8 MR. LIESEMER: I join.

9 THE WITNESS: It's going to
 10 settle claims pursuant to the
 11 Trust Distribution Process.

12 BY MR. BROWN:

13 **Q. Okay. Will the Debtors'**
 14 **insurers have any role in the handling**
 15 **defense or settlement of any claim**
 16 **submitted to the Asbestos PI Trust?**

17 MR. GUY: Objection.

18 MR. LIESEMER: Objection to
 19 form.

20 MR. GUY: Objection, calls
 21 for speculation.

22 MS. BAER: Objection, same.

23 THE WITNESS: Let me address
 24 audit rights. In my copious free

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1 time, Mr. Brown, I am the claims
 2 administrator of the Dow Corning
 3 Trust -- that is not an asbestos
 4 Trust -- and this issue has arisen
 5 in that context. And I dare say
 6 it may arise in the context of the
 7 W.R. Grace Trust.

8 If insurance companies
 9 object to paying because they do
 10 not have audit rights or because
 11 of any other input into the Trust,
 12 I dare say they are going to bring
 13 that to the attention of the
 14 trustees. And either that will be
 15 worked out between the trustees
 16 and the insurance company or
 17 some -- I don't like this phrase
 18 because I am not sure I know what
 19 it means -- but some coverage.
 20 court will have to determine the
 21 rights of the insurance company as
 22 a function of the trustees'
 23 duties.

24 MR. BROWN: Could you read

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1 back the question?

2 (The reporter read from the
3 record as requested.)

4 BY MR. BROWN:

5 **Q. Other than what you just**
6 **described, will the Debtors' insurers**
7 **have any role in the handling defense or**
8 **settlement of asbestos PI claims into the**
9 **Trust?**

10 MR. GUY: Same objection as
11 to speculation.

12 MR. LIESEMER: Same
13 objection.

14 MS. BAER: Same.

15 THE WITNESS: I don't know
16 what the trustees are going to do
17 about that, so I don't know.

18 MR. BROWN: Why don't we
19 take five minutes.

20 (There was a break from
21 11:46 a.m. to 11:57 a.m.)

22 MR. BROWN: Let's go ahead
23 and mark this document.

24 (Austern-5 marked for

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1 A. No.

2 **Q. Is there a reason for that?**

3 A. I don't know.

4 MR. BROWN: All right.

5 Let's mark this.

6 (Austern-6 marked for
7 identification at this time.)

8 BY MR. BROWN:

9 **Q. Mr. Austern, you have**
10 **another document in front of you now**
11 **marked Austern-6. It's Exhibit 10 to the**
12 **Exhibit Book.**

13 **Can you identify this**
14 **development?**

15 A. It is the Cooperation
16 Agreement between the Debtor and others.

17 **Q. And, again, this is one of**
18 **the documents that you reviewed in**
19 **preparation for today's deposition,**
20 **correct?**

21 A. I don't remember if I
22 specifically did it for that purpose, but
23 I have certainly reviewed it in the past.

24 **Q. Okay. What is the purpose**

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1 identification at this time.)

2 BY MR. BROWN:

3 **Q. Mr. Austern, you have been**
4 **handed what's been marked Austern-5.**
5 **It's Exhibit 4 to the Exhibit Book.**

6 **Can you identify it?**

7 A. This is the TDP for the
8 Plan.

9 **Q. I am correct, am I not, that**
10 **this is one of the documents that you**
11 **reviewed in preparation for today's**
12 **deposition?**

13 A. Yes.

14 **Q. Are you aware of any**
15 **provision in the TDP or the Trust**
16 **Agreement that we spoke about earlier**
17 **that provides for any role for the**
18 **Debtors' insurers in the handling,**
19 **defense, or settlement of any asbestos**
20 **claims submitted to the Trust?**

21 A. No.

22 **Q. Are you aware of any other**
23 **Plan document that provides for such a**
24 **role?**

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1 **of this document?**

2 A. I am not sure I know the
3 legal purpose. It creates certain rights
4 and obligations between and among some of
5 the parties.

6 **Q. Okay. And who are those**
7 **parties?**

8 A. Well, the Debtor, the
9 Reorganized Debtor, and the Trust. I
10 mean the personal injury Trust.

11 **Q. The Debtors' insurers are**
12 **not a party to this agreement, correct?**

13 A. No.

14 **Q. We talked a little bit**
15 **earlier about general liability insurance**
16 **policies.**

17 **Are you generally familiar**
18 **with what's called duty to cooperate in a**
19 **general liability policy on the part of**
20 **the insured?**

21 A. Generally.

22 MR. LIESEMER: Objection to
23 form.

24 BY MR. BROWN:

1 Q. If the Joint Plan is
2 confirmed and if there is a duty to
3 cooperate under a given policy, what
4 happens to that duty?

5 MR. GUY: Objection, calls
6 for speculation.

7 THE WITNESS: Well, the
8 proceeds of the policy have been
9 transferred to the Personal Injury
10 Trust. I don't know what happens
11 to the duty of the Trust standing
12 in the shoes of the Debtor.

13 BY MR. BROWN:

14 Q. So you don't know whether
15 the Trust steps into the shoes of the
16 Debtor with respect to the Debtors'
17 obligations under the policy; is that
18 what your telling me?

19 A. I don't know.

20 MR. BROWN: I think I am
21 going to pass you to the next
22 questioner, Mr. Austern. Thank
23 you. Subject to maybe a few
24 follow-ups, I am finished.

1 Exhibit-4, which is the Transfer
2 Agreement, and look at Schedules 2 and 3?

3 A. (Witness complies with
4 request.)

5 Q. Correct me if I'm wrong, I
6 believe you said you weren't sure what
7 the difference was between Schedules 2
8 and 3?

9 A. In the sense that I don't
10 know why there are two schedules. I
11 mean, clearly different people are listed
12 under certain schedules.

13 Q. Do you have an understanding
14 that the types of settlement agreements
15 are different on Schedule 2 and Schedule
16 3?

17 A. I assume that's why there
18 are two schedules.

19 Q. You previously also
20 mentioned that you understood that there
21 were three types of insurance agreements;
22 there were settlements -- there were
23 settled insurers, there were unsettled
24 insurers, and there were insurers are

1 - - -
2 EXAMINATION
3 - - -

4 BY MS. ALCABES:

5 Q. Hello, Mr. Austern. My name
6 is Elisa Alcabes from Simpson Thacher &
7 Bartlett. I am counsel for Travelers
8 Casualty and Surety Company.

9 Travelers served a Notice of
10 Deposition on you. I am just going to
11 have that marked.

12 (Austern-7 marked for
13 identification at this time.)

14 BY MS. ALCABES:

15 Q. Do you recall seeing this
16 notice?

17 A. I saw many notices. I don't
18 know if I saw this one.

19 Q. Okay. And are you familiar
20 at all with any of the agreements between
21 Travelers and W.R. Grace that were
22 entered into pre-petition?

23 A. No.

24 Q. Can you turn to Austern

1 coverage in place agreements or
2 reimbursement agreements? I am not sure
3 I said that exactly right.

4 I believe you said you
5 understood there were three types of
6 settled insurers -- three types of
7 insurers. I have got it right now.
8 Three types of insurers.

9 There are unsettled
10 insurers, fully settled insurers, and
11 insurers with coverage in place or
12 reimbursement agreements; is that right?

13 A. That is my understanding.

14 Q. And that's how you
15 understand this Plan to operate; is that
16 correct?

17 A. Yes.

18 Q. Okay. So do you understand
19 that Schedule 2 lists the fully settled
20 insurers, the insurers that have fully
21 settled agreements?

22 A. What do you mean by fully?

23 Q. Fully paid settlement
24 agreements.

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<p>1 MR. PLEVIN: Let me 2 reiterate my view that Mr. Austern 3 is a party to the case, and -- all 4 right. Let me see if I can get to 5 the point of demonstrating the 6 relevance in this fashion. 7 MR. GUY: I will tell you 8 what. If I could talk to my 9 client for two seconds, I think we 10 can cut through this. 11 MR. PLEVIN: Sure. 12 (There was a discussion held 13 off the record at this time.) 14 MR. GUY: You may answer the 15 question as long as there is an 16 express understanding that you are 17 not going to argue that there is 18 any kind of waiver of privilege in 19 the answer. 20 MR. PLEVIN: That's 21 acceptable. 22 THE WITNESS: I believe 23 there is a question on the floor. 24 BY MR. PLEVIN:</p>	<p>1 the proof of claim filed by Fireman's 2 Fund that I described a moment ago? 3 MS. BAER: Objection as to 4 form. 5 MR. GUY: Objection. 6 You may answer. 7 THE WITNESS: No. 8 BY MR. PLEVIN: 9 Q. Do you have an 10 understanding, Mr. Austern, as to what 11 the rights of the Edwards plaintiffs 12 would be under the Plan in the TDPs in 13 the event that the judgment that they 14 currently hold were to be reversed by 15 either the Texas Court of Appeals or the 16 Texas Supreme Court? 17 MS. BAER: Objection, form. 18 MR. LIESEMER: Same 19 objection. 20 MR. PLEVIN: What was the 21 objection? 22 MS. BAER: Form. 23 THE WITNESS: You are asking 24 me, do I have a view of what they</p>
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<p>1 Q. Yes. And I believe the 2 question on the floor is whether you have 3 an opinion as to the likelihood of 4 success on appeal or the strength of 5 Grace's position on appeal in the Edwards 6 matter? 7 A. No. 8 MS. BAER: Objection to the 9 extent you are requesting 10 communications among the 11 co-proponents and therefore the 12 codefendants. 13 MR. LIESEMER: And I join 14 the objection. 15 MR. PLEVIN: And I will 16 reiterate that I was not asking 17 him about any communications. I 18 was asking him about his own view. 19 BY MR. PLEVIN: 20 Q. And your answer, 21 Mr. Austern? 22 A. I have no view. 23 Q. Do you have a view as to the 24 proper classification under the Plan of</p>	<p>1 would do? 2 BY MR. PLEVIN: 3 Q. What their rights would be 4 under the Plan. 5 A. I assume their rights would 6 be to file a personal injury claim with 7 the Trust. 8 Q. As opposed to taking their 9 case back to a trial court, if it were 10 remanded for a new trial and retrying the 11 case in the trial court? 12 MS. BAER: Objection. Now 13 you are asking for a legal 14 conclusion. 15 MR. LIESEMER: Objection, 16 speculation, hypothetical. 17 THE WITNESS: I don't know. 18 My understanding of the Plan is 19 they got to file a Personal Injury 20 Trust claim. 21 BY MR. PLEVIN: 22 Q. If there is a reversal? 23 A. Yes. 24 Q. Do you understand,</p>

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1 **Mr. Austern, the concept of set-off in**
2 **bankruptcy?**

3 A. I understand set-off
4 generally as a proposition. I am not
5 sure I would apply it -- I don't know
6 that I know enough bankruptcy law to
7 apply it to bankruptcy.

8 **Q. Okay. What is your**
9 **understanding of the concept of set-off?**

10 A. Well, if I owe you \$10,000
11 and I have to pay Mr. Guy because you owe
12 him some money, I can set-off from what I
13 paid Mr. Guy what I owe you.

14 MR. PLEVIN: Can you read
15 that answer back?

16 (The reporter read from the
17 record as requested.)

18 BY MR. PLEVIN:

19 **Q. Are you aware, Mr. Austern,**
20 **that Grace has made claims for insurance**
21 **coverage against Fireman's Fund under**
22 **liability insurance policies issued by**
23 **Fireman's Fund?**

1 A. Yes.

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1 question without getting into a
2 legal analysis. He is here as a
3 fact witness.

4 But, again, let me talk to
5 my client, and I think we can
6 resolve it with the answer.

7 MS. BAER: We join in the
8 objection.

9 (There was a discussion held
10 off the record at this time.)

11 THE WITNESS: I have no
12 view.

13 BY MR. PLEVIN:

14 **Q. Do you have a concern that**
15 **if the Edwards appeal were to be --**
16 **withdrawn.**

17 **Do you have a concern that**
18 **if the Edwards judgment were to be**
19 **affirmed on appeal and Fireman's Fund**
20 **paid money to Edwards and then made a**
21 **claim against Grace for the amount paid,**
22 **that that would in some way reduce the**
23 **amount of money coming into the Trust**
24 **from the Fireman's Fund insurance policy?**

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1 **Q. And that the insurance**
2 **coverage claims Grace has made at least**
3 **include, if not -- they are not limited**
4 **to claims for coverage of asbestos**
5 **personal injury claims?**

6 A. I am sorry. Can you say
7 that again?

8 **Q. I got a little tied up**
9 **there.**

10 Grace is seeking coverage
11 from Fireman's Fund under the Fireman's
12 Fund insurance coverage policies for
13 asbestos personal injury claims asserted
14 against Grace, correct?

15 A. Yes.

16 **Q. Do you have a view as to**
17 **whether in the event that Fireman's Fund**
18 **is obligated to pay insurance coverage to**
19 **Grace, Fireman's Fund would be able to**
20 **reduce that obligation by any amount that**
21 **Grace is obligated to pay under the**
22 **indemnity agreement?**

23 MR. GUY: Objection. I
24 don't see how he can answer that

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1 MR. LIESEMER: Objection to
2 the form.

3 MS. BAER: Objection.

4 MR. GUY: Objection to form.

5 THE WITNESS: Mr. Plevin, I
6 have any concern that the activity
7 might reduce the amount of
8 insurance coming into the Grace
9 Trust. And I understand this is
10 approximately \$6 million. And if
11 Fireman's Fund were to reduce its
12 payment or be entitled to reduce
13 its payment under the Fireman's
14 Fund policy for asbestos personal
15 injury to the Trust and it would
16 reduce it by \$6 million, yes, I
17 have a concern.

18 BY MR. PLEVIN:

19 **Q. And I am sure this has been**
20 **established on the record long before I**
21 **came here, but let me just ask this**
22 **question for foundational purposes.**

23 You are an attorney,
24 Mr. Austern?

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1 A. Yes.

2 **Q. And you have practiced law**
3 **for how many years?**

4 A. 45.

5 MR. PLEVIN: Thank you. I
6 have no further questions.

7 MR. CALOGERO: I have no
8 questions.

9 MR. WISLER: Maryland
10 Casualty has no questions.

11 MR. GUY: Are there any
12 insurers on the phone who have
13 questions?

14 Scotts? BNSF? Do you have
15 any questions?

16 MS. COBB: Yes. This is
17 Tiffany Cobb on behalf of The
18 Scotts Company, LLC, with Vorys,
19 Sater, Seymour and Pease. Can you
20 hear me?

21 MR. GUY: Yes. Hi, Tiffany.

22 - - -

23 EXAMINATION

24 - - -

1 who specifically do you view as your
2 punitive clients?

3 A. Future claimants.

4 **Q. Okay. And in your capacity**
5 **as the FCR then, do you owe a fiduciary**
6 **duty to asbestos PI claimants as defined**
7 **in the Plan who hold future demands**
8 **against any entity that is addressed in**
9 **the definition of an asbestos PI**
10 **claimant?**

11 A. Can you repeat the last part
12 of that. Against whom?

13 **Q. Sure. Against any entity**
14 **that is addressed in the definition of**
15 **asbestos PI claimant?**

16 A. Yes.

17 **Q. In your capacity as the FCR,**
18 **do you owe a fiduciary duty to indirect**
19 **PI Trust claimants who hold future**
20 **demands against the Debtors?**

21 A. Yes.

22 **Q. In your capacity as the FCR,**
23 **do you owe a fiduciary duty to**
24 **insurance-related claimants who hold**

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1 BY MS. COBB:

2 **Q. Mr. Austern, in your**
3 **capacity as the Asbestos PI Future**
4 **Claimants' Representative, what fiduciary**
5 **duties do you owe?**

6 MR. GUY: Tiffany, we
7 covered that earlier in the
8 deposition. Were you listening
9 in?

10 MS. COBB: I was.

11 MR. GUY: I just don't want
12 to have a lot of duplicity in the
13 questioning. I will allow this
14 one.

15 THE WITNESS: I have a
16 fiduciary duty to future
17 claimants.

18 BY MS. COBB:

19 **Q. But what are the duties?**

20 A. Essentially to make sure
21 there is sufficient funds, that when they
22 file claims they will be treated the same
23 or similarly to present claimants.

24 **Q. In your capacity as the FCR,**

1 future demands against any settled
2 insurance company?

3 A. I think I would have to go
4 back and look at the definition of those
5 people.

6 **Q. Okay. Then let's do that.**
7 **If you would, please, look at Exhibit-5**
8 **which is the TDP, and if you would please**
9 **look at Section 5.12.**

10 A. I am looking at it, but give
11 me a moment.

12 **Q. Sure.**

13 A. Okay. What was the
14 question?

15 **Q. In your capacity as the FCR,**
16 **do you owe a fiduciary duty to**
17 **insurance-related claimants who hold**
18 **future demands against any settled**
19 **insurance companies?**

20 A. I don't know. I would have
21 to think about that. I realize they
22 could be indirect claimants, at least I
23 think they could be indirect claimants.
24 So I would have to think about that. I

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<p>1 mean, I didn't mean this instant.</p> <p>2 Q. Mr. Austern, if an</p> <p>3 insurance-related claimant is not an</p> <p>4 indirect PI claimant, what other type of</p> <p>5 claimant as defined in the Plan would you</p> <p>6 think they would be?</p> <p>7 A. That's exactly what my</p> <p>8 problem is. I am trying to see if they</p> <p>9 would be an indirect claimant, and,</p> <p>10 therefore, I don't know what other type</p> <p>11 of claim they would have in the context</p> <p>12 of this Plan. And that's my confusion.</p> <p>13 But if they are, then it seems to me I</p> <p>14 owe a fiduciary duty to them.</p> <p>15 Q. And if an insurance-related</p> <p>16 claimant is an asbestos PI claimant, as</p> <p>17 opposed to an indirect PI Trust claimant,</p> <p>18 would your answer be the same?</p> <p>19 MR. GUY: Objection,</p> <p>20 hypothetical and speculation.</p> <p>21 THE WITNESS: The insurance</p> <p>22 company as a PI claimant?</p> <p>23 BY MS. COBB:</p> <p>4 Q. As an asbestos PI claimant.</p>	<p>1 the question.</p> <p>2 MS. BAER: I join in the</p> <p>3 objection.</p> <p>4 THE WITNESS: I don't know.</p> <p>5 The Debtor is certainly -- it says</p> <p>6 for which the Debtor has</p> <p>7 liability. If that's the same,</p> <p>8 then yes.</p> <p>9 BY MS. COBB:</p> <p>10 Q. Would you agree that in</p> <p>11 state court action, there are asbestos PI</p> <p>12 claimants who have asserted bodily injury</p> <p>13 asbestos-related claims relating to Grace</p> <p>14 vermiculite against one or more indirect</p> <p>15 PI claimants?</p> <p>16 MS. BAER: Objection,</p> <p>17 foundation.</p> <p>18 MR. LIESEMER: Same</p> <p>19 objection.</p> <p>20 MR. GUY: Objection.</p> <p>21 THE WITNESS: I am familiar</p> <p>22 that the Libby claimants have</p> <p>23 filed such claims.</p> <p>24 BY MS. COBB:</p>
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<p>1 A. I must confess that I</p> <p>2 haven't thought about that because I</p> <p>3 don't know how it could happen.</p> <p>4 Q. Would you agree that in</p> <p>5 Exhibit-3, the definition of an</p> <p>6 asbestos -- pardon me -- strike that.</p> <p>7 Would you agree that in</p> <p>8 Exhibit-3 the definition of an indirect</p> <p>9 PI Trust claimant is defined to be a</p> <p>10 claim or demand against the Debtors?</p> <p>11 MR. GUY: Standing objection</p> <p>12 that the Plan says what it says.</p> <p>13 THE WITNESS: I see a</p> <p>14 definition of an indirect PI Trust</p> <p>15 claim. I don't see a claimant.</p> <p>16 Is that what you are were</p> <p>17 referring to?</p> <p>18 BY MS. COBB:</p> <p>19 Q. Pardon me. Yes. The</p> <p>20 definition of indirect PI Trust claim is</p> <p>21 defined as a claim or demand against</p> <p>22 Debtors?</p> <p>23 MR. LIESEMER: If that's a</p> <p>24 question, I object to the form of</p>	<p>1 Q. Are you aware of any other</p> <p>2 asbestos PI claimants who have asserted</p> <p>3 asbestos-related bodily injury claims</p> <p>4 relating to Grace vermiculite against one</p> <p>5 or more indirect PI claimants?</p> <p>6 MS. BAER: Objection,</p> <p>7 foundation.</p> <p>8 MR. GUY: Objection, form.</p> <p>9 Tiffany, I am not sure. I think</p> <p>10 that's one is vague.</p> <p>11 THE WITNESS: I am not.</p> <p>12 BY MS. COBB:</p> <p>13 Q. With respect to the Libby</p> <p>14 claimants' actions of which you are aware</p> <p>15 in the state court system, would you</p> <p>16 agree that those asbestos PI claimants</p> <p>17 and the indirect PI claimants against</p> <p>18 whom they have asserted their claims are</p> <p>19 adversaries in those actions?</p> <p>20 MS. BAER: Objection,</p> <p>21 foundation.</p> <p>22 MR. GUY: Objection.</p> <p>23 THE WITNESS: If one is a</p> <p>24 plaintiff and one is a defendant,</p>